BAYER (M) SDN BHD

v.

NG HONG PAU

COURT OF APPEAL, KUALA LUMPUR
SHAIK DAUD ISMAIL JCA
NH CHAN JCA
SITI NORMA YAAKOB JCA
[CIVIL APPEAL NO: W-04-28-1998]
8 SEPTEMBER 1999

ADMINISTRATIVE LAW: *Remedies - Certiorari, application for - Whether Industrial Court erred in coming to decision*

LABOUR LAW: *Employment - Termination of service - Contention of expectant losses - Whether sustainable - Redundancy - Whether employee's functions ceased to exist*

The respondent began employment with the appellant as an operations manager. In January 1988, the appellant reorganised the respondent's department by dividing it into the logistics and sales department and the production department. The respondent was put in charge of the former, while the latter department was headed by his former assistant manager.

In September 1990, the appellant terminated the respondent's services, citing firstly that it was expected to suffer operational losses in excess of over RM1 million for 1990, and secondly, that his position with the company had become redundant. Based on these, the respondent alleged that he had been unfairly dismissed.

The matter proceeded to the Industrial Court where an award was made in the respondent's favour. Dissatisfied with the decision, the appellant applied to the High Court for an order of *certiorari* to quash the award but the application was rejected as the High Court could not find any form of impropriety committed by the Industrial Court. The appellant appealed.

Held:
Per Shaik Daud Ismail JCA

[1] The appellant's first ground for dismissal was not sustainable as evidence showed that in 1990, it had paid non-contractual increments amounting to RM328,237; increased the director's emolument by RM36,000; declared a dividend of RM129,350; and had made a profit of RM1.5 million. It had even paid bonuses in that year.

[2] In redundancy matters, the employer must actually prove that there is such a situation to justify dismissal. Merely to adduce evidence of a reorganisation exercise is certainly insufficient.

[3] There were no changes to the respondent's workload even though the appellant's sales had dropped. Further evidence indicated that his workload had been taken by two of his colleagues upon his termination.

[4] The appellant could not produce sufficient evidence to prove that the respondent's functions were reduced to such an extent that he could be considered redundant.

[5] The learned judge was correct in not interfering with the decision of the Industrial Court.

[Appealed dismissed with costs.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Pihak responden memulakan kerjayanya dengan pihak perayu sebagai pegurus operasi. Dalam Januari 1988, pihak perayu telah menyusun-semula bahagian responden dengan membahagikannya kepada bahagian logistik dan jualan, dan bahagian produksi. Responden dipertanggungjawabkan dengan bahagian pertama sementara bahagian yang kemudiannya diketuai oleh seorang yang dahulunya penolong pengurusnya.

Dalam September 1990, pihak perayu telah memberhentikan perkhidmatan responden, sambil mengadu bahawa pertamanya, mereka menjangka akan mengalami kerugian lebih dari RM1 juta dalam tahun 1990, dan keduanya, bahawa kedudukan responden tersebut telah menjadi berlebihan ("redundant"). Berdasarkan kejadian tersebut, responden mengadu bahawa pembuangan kerjanya adalah secara tidak adil atau sah.

Kes ini seterusnya dihadapkan ke Mahkamah Perusahaan di mana keputusan penghakiman yang diberi berbelah kepada responden (sila lihat [1997] 3 ILR 334). Pihak perayu tidak berasa puas hati dengan keputusan itu dan telah membuat permohonan ke Mahkamah Tinggi untuk perintah *certiorari* untuk membatalkan award berkenaan tetapi permohonannya ditolak kerana mahkamah itu tidak dapat mencari apa-apa kesalahan yang diperlakukan oleh tribunal tersebut.

Pihak perayu kemudiannya merayu ke mahkamah ini untuk mengenepikan keputusan Mahkamah Tinggi tersebut.

Diputuskan:
Oleh Shaik Daud Ismail HMR

[1] Alasan pembuangan kerja pertama pihak perayu tidak terpakai kerana bukti menunjukkan bahawa dalam tahun 1990, mereka telah membuat pembayaran kenaikkan gaji tidak berkontrak sebanyak RM328,327; telah menaikkan penggajian direktor sebanyak RM36,000; telah mengisytiharkan pembayaran dividen sebanyak RM129,350 dan telah mengaut keuntungan sebanyak RM1.5 juta. Mereka juga telah membayar bonus dalam tahun itu.

[2] Dalam hal berlebihan ('redundancy'), perayu semestinya membuktikan bahawa terdapat situasi yang sedemikian rupa unutk menjustifikasikan suatu pembuangan kerja. Hanya dengan mengutarakan bukti penyusunan-semula tidaklah memadai.

[3] Tidak terdapat apa-apa penukaran terhadap kuantiti kerja responden walaupun jumlah jualan pihak perayu telah menurun. Terdapat bukti yang selanjutnya yang menunjukkan bahawa kerjanya telah diambil-alih oleh dua rakan sekerjanya sebaik sahaja perkhidmatan responden ditamatkan.

[4] Pihak perayu tidak dapat mengemukakan bukti yang secukupnya untuk membuktikan bahawa fungsi responden telah dikurangkan sedemikian rupa sehingga dia boleh dianggap sebagai berlebihan ("redundant").

[5] Hakim bijaksana Mahkamah Tinggi sewajarnya telah tidak masuk campur dengan keputusan Mahkamah Perusahaan.

[Rayuan ditolak dengan kos.]

Case(s) referred to:
Chapman & Ors v. Goonvean & Rostawvack China Clay Co Ltd [1983] 2 All ER ***(refd)***
Goon Kwee Phoy v. J & P Coats (M) Bhd [1981] 2 MLJ 129 ***(refd)***

Legislation referred to:
Industrial Relations Act 1967, s. 20(1), (3)

For the appellant - TM Varughese; M/s TM Varughese & Co
For the respondent - P Kuppusamy (P Thavaselvi with him); M/s Kuppusamy & Co

[Appeal from High Court, Kuala Lumpur; Originating Motion No: R2-25-142-97]

Reported by Adrian Fernandez

JUDGMENT

Shaik Daud Ismail JCA:

This is an appeal from the decision of the High Court which had on 18 May 1998, dismissed the appellant's application for *certiorari* to quash the award of the Industrial Court handed down on 30 September 1997.

The facts of the case are that the respondent commenced employment on 1 June 1980 with the appellant as Operations Manager of the Operations Department of the Crop Protection Division which was originally known as the Agro Chemical Division. He had four subordinates under him namely, assistant manager, assistant executive and two general clerks.

On 1 January 1988, the appellant decided to split the operations department into two, one was called Production Department and the other Logistic and Sales Administration Department. The respondent's former assistant manager, one Loh Chee Kong, was appointed as the manager of the Production Department and the respondent was appointed as the Logistic and Sales Administration Manager.

Everything appeared to be going on smoothly thereafter until 17 September 1990, the appellant wrote to the respondent informing him that his employment was terminated with effect from the date of the letter giving two reasons (1) that the appellant expected to suffer operational loss in excess of over one million ringgit for 1990 and (2) that the respondent's position with the appellant was redundant.

Naturally the respondent was not happy with this move and he made representations to the Director General of Industrial Relations (DGIR) that he had been dismissed without just cause or excuse and sought reinstatement. The representations were made pursuant to s. 20(1) of the Industrial Relations Act 1967 (the Act).

The DGIR having failed to affect a settlement, reported the matter to the Minister of Human Resources who in turn referred it to the Industrial Court for an enquiry pursuant to s. 20(3) of the Act.

After a full enquiry, the Industrial Court found that on the evidence of witnesses, the respondent's dismissal was without just cause or excuse and *in lieu* of re-instatement, the court awarded the respondent as follows:

a) Arrears of salary of RM5,350 per month from 17 September 1990 to the last day of the hearing on the case *ie*, 23 December 1996 together with the 13th month salary for the year 1990 to 1996, less two months salary *in lieu* of notice which was paid subject to EPF deductions;

b) 16 months salary at RM5,350 per month as compensation *in lieu* of reinstatement being one month salary every year of completed service.

It was the finding of the Industrial Court that the appellant "failed to make out a case to justify the dismissal of the respondent." The court found on the materials before it that the claim by the appellant that the post held by the respondent was redundant and was not convincing as the court found as a fact that the workload of the respondent remained almost the same even though the turnover of the sale was reduced, and even after the respondent was dismissed the job previously carried out by the respondent were shared by three other staff.

Another reason given was that the appellant did not adhere to the guidelines in the Code of Conduct for Industrial Harmony in that the appellant failed to show any convincing evidence that it tried its best to find some other jobs for the respondent within the company.

After reviewing the award of the Industrial Court, the High Court was of the view that the Industrial Court had made a proper evaluation of all the evidence before it and therefore the High Court was of the view that the Industrial Court's conclusion that the dismissal of the respondent was without just cause or excuse, was proper. The High Court found no reason to interfere with the award and dismissed the appellant's application with costs.

It is our view that although the High Court is not acting in its appellate capacity in reviewing awards of the Industrial Court, it nevertheless should not interfere in the Industrial Court's findings of facts. In this case, the Industrial Court after hearing evidence from witnesses, came to a finding of fact on the alleged reasons for the dismissal by the appellant. The appellant in their letter of 17 September 1990 dismissing the respondent, gave two reasons for the dismissal. It is therefore encumbent on the Industrial Court to determine whether the appellant had shown by evidence that these two reasons exist to justify the dismissal. In *Goon Kwee Phoy v. J & P Coats (M) Bhd.* [1981] 2 MLJ 129, the Federal Court at 136 held:

> When representations are made and are referred to the Industrial Court for enquiry, it is the duty of that court to determine whether the termination or dismissal is with or without just cause or excuse. If the employer chooses to give a reason for the action taken by him, the duty of the Industrial Court will be to enquire whether that excuse or reason has or has not been made out. If it **finds as a fact** that it has not been proved, then the inevitable conclusion must be that the termination or dismissal was without just cause or excuse. The proper enquiry of the court is the reason advanced by it and that court or the High Court cannot go into another reason not relied on by the employer or **find one for it**. (the emphasis is ours).

As mentioned earlier, the appellant gave two reason for the dismissal *ie*, that they "**expected** to suffer operational loss in excess of one million ringgit for 1990 and the respondent's position was found to be redundant." It is therefore, encumbent upon the appellant to adduce evidence to show both the above reasons existed before the Industrial Court.

The first reason fell flat when the evidence showed that in 1990 the appellant paid non-contractual salary increments amounting to RM328,237.70 for that year; increased the director's emolument by RM36,000; declared a dividend of RM129,350 and that the appellant made a profit of RM1.5 million. Mr. Knut Rolf Herzer, the Managing Director, also confirmed that the appellant paid bonuses for 1990. He also confirmed and thereby contradicted his earlier evidence, that the respondent was dismissed because his work ceased to exist and that it had nothing to do with the expected loss.

On redundancy it cannot be gainsaid that the appellant must come to the court with concrete proof. The burden is on the appellant to prove actual redundancy on which the dismissal was grounded. (See *Chapman & Others v. Goonvean & Rostawvack China Clay Co. Ltd.* [1983] 2 All ER). It is our view that merely to show evidence of a re-organisation in the appellant is certainly not sufficient. There was evidence before the court that although sales were reduced, the workload of the respondent remained the same. After his dismissal his workload was taken over by two of his former colleagues. Faced with these evidence, is it any wonder that the court made a finding of fact that there was no convincing evidence produced by the appellant that the respondent's functions were reduced to such an extent that he was considered redundant.

On the totality of the evidence, we are satisfied that the learned judge was right in not interfering with the award of the Industrial Court. We dismissed the appeal with costs and ordered the deposit to go to account of the respondent's taxed costs.